

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

-v-

Case No. 19-20652

D-1 James Letko,
D-2 Steven King,
D-3 Rami Lazeki,
D-4 Patricia Flannery,
D-5 Katherine Peterson,

Defendants.

MOTION HEARING
September 10, 2020

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge

HEARING CONDUCTED VIA VIDEO CONFERENCE
ALL PARTIES APPEARING REMOTELY

APPEARANCES:

FOR THE PLAINTIFF: MALISA CHOKSHI DUBAL
JOHN McCORMACK
United States Attorney's Office
211 West Fort Street, Suite 2001
Detroit, Michigan 48226

FOR THE DEFENDANT GEORGE B. DONNINI
JAMES LETKO: THEODORE R. EPPEL
Butzel Long
150 West Jefferson, Suite 100
Detroit, Michigan 48226

(Appearances continued to following page)

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Rene L. Twedt, CSR-2907, RDR, CRR, CRC
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1 APPEARANCES CONTINUED:

2

3 FOR THE DEFENDANT NATASHA D. WEBSTER
4 STEVEN KING: Federal Community Defender
613 Abbot Street
5 Detroit, Michigan 48226

5

6 FOR THE DEFENDANT JAMES W. BURDICK
7 RAMI LAZEKI: Burdick Law, P.C.
1760 South Telegraph Road
Suite 300
8 Bloomfield Hills, Michigan 48302

9

10 FOR THE DEFENDANT N.C. DeDAY LaRENE
PATRICIA FLANNERY: LaRene & Kriger
645 Griswold Street
11 Suite 1717
Detroit, Michigan 48226

12

13 FOR THE DEFENDANT MARK A. BERMAN
14 KATHERINE PETERSON: Hartmann, Doherty, Rosa,
Berman & Bulbulia, LLC
433 Hackensack Avenue
15 Suite 1002
Hackensack, New Jersey 07601

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1 Detroit, Michigan

2 September 10, 2020

3 10:58 a.m.

4 * * *

5 THE COURT: Court is in session. This is the United
6 States District Court for the Eastern District of Michigan.

7 This is Case Number 19-20652, United States of
8 America versus James Letko and others.

9 We are here today via videoconferencing. I find that
10 the proceedings cannot be conducted in person without serious
11 jeopardy to public health.

12 The motion hearing is being conducted via video,
13 because I also find that further delaying these proceedings
14 would cause harm to the interests of justice.

15 Before we begin, would the Government put its
16 appearance on the record, please?

17 MS. DUBAL: Yes, your Honor. Good afternoon.
18 My name is Malisa Dubal. I'm appearing on behalf of the
19 Government.

20 And John McCormack is appearing or is on the phone as
21 well on behalf of the Government.

22 THE COURT: All right. Mr. McCormack apparently is
23 not able to communicate with us, however.

24 Mr. Donnini, please, your appearance on behalf of
25 your client.

1 MR. DONNINI: Yes, your Honor. George Donnini, and
2 I'll go ahead and on behalf of T.R. Eppel, on behalf of
3 Mr. Jim Letko, who is also participating.

4 THE COURT: All right. And for Defendant King.

5 MS. WEBSTER: Good afternoon, your Honor. Natasha
6 Webster on behalf of Mr. King.

7 THE COURT: And for Defendant Lazeki.

8 MR. BURDICK: Good afternoon, your Honor. James
9 Burdick appearing on behalf of Mr. Lazeki who is, as you can
10 see, seated behind me.

11 THE COURT: Yes. Lazeki. Pardon me. I
12 mispronounced his name and I apologize.

13 Mr. Burdick, is it possible for you to raise your
14 volume?

15 MR. BURDICK: If somebody will tell me how. DeDay,
16 can you help me here?

17 THE COURT: Or get closer to the microphone.

18 MR. BURDICK: Oh, let's see. Let's see if I can pull
19 this.

20 How about now; is that any better?

21 THE COURT: Slightly better.

22 Ms. Twedt, can you hear Mr. Burdick all right?

23 (Discussion held off the record.)

24 THE COURT: Thank you.

25 And appearance for Defendant Flannery.

1 MR. LaRENE: Yes, sir. Deday LaRene on behalf of
2 Ms. Flannery, who is participating and whose unsmiling visage
3 is available.

4 THE COURT: All right.

5 MR. LaRENE: Smiling now.

6 THE COURT: Thank you.

7 And on behalf of Ms. Peterson.

8 MR. BERMAN: Good afternoon, your Honor. Mark A.
9 Berman on behalf of Katherine Peterson, who is sitting to my
10 right slightly behind me.

11 THE COURT: All right. We have Defendant Letko's
12 motion to compel disclosure of Brady materials, to strike
13 surplusage, and to dismiss/strike Count 1 of the indictment.
14 We have Defendant Peterson's motion for a bill of particulars.
15 And we have Defendant King's motion to sever.

16 We will begin with Defendant Letko's motion to compel
17 disclosure of Brady materials, which is Docket Number 82.

18 Mr. Donnini.

19 MR. DONINNI: Thank you, your Honor.

20 MS. DUBAL: Your Honor. Your Honor, I apologize.

21 May I ask if your Honor would just implore the
22 Government, if we could just start on the motions that I
23 intended on handling today in the hopes that Mr. McCormack
24 will be able to figure out his technical issues by the time
25 that we are finished with those arguments? If your Honor

1 would implore the Government. I apologize for interrupting,
2 but I'm wondering if that would be an option.

3 THE COURT: Well, it is problematic because of the
4 way I have these prepared.

5 MS. DUBAL: Okay.

6 THE COURT: Let's see. Let me just turn to
7 Mr. Eppel, then, on the motion to dismiss Count 1 of the
8 indictment.

9 Were you going to argue that one, Ms. Dubal?

10 MS. DUBAL: Yes, your Honor. I plan on arguing the
11 motion to dismiss, the motion to strike surplusage, and --

12 THE COURT: All right. Then we'll take that one.

13 Mr. Eppel, you may proceed.

14 MR. EPPEL: Okay. Thank you, your Honor.

15 MS. DUBAL: Thank you.

16 MR. EPPEL: Can you hear me okay?

17 THE COURT: Yes.

18 MR. EPPEL: Okay. So I know your Honor has read the
19 briefing carefully, and so I'm not going to go over every
20 single argument that we made in our briefs, but I do want to
21 reiterate some of the main points.

22 The main thrust of our motion is that Count 1 of the
23 indictment in this case rests on new and novel claims that an
24 ordinary person such as Mr. Letko could not have possibly
25 known would result in criminal liability.

1 I will note that the Government failed to address
2 most of our arguments head on in their response. Instead they
3 argue that the -- because they laid out the basic elements of
4 these charged offenses, that should be enough to prop up each
5 of these allegations that were challenged in our motion. But
6 simply parroting the elements of the charged offenses should
7 not be a sufficient basis for due process in a case like this
8 that rests on such new and novel claims.

9 First, we argue that the allegation in paragraph 30
10 that Mr. Letko and others committed fraud by concealing
11 Mr. Letko's ownership in some of the A1C Pharmacies was not
12 alleged to be material, nor could it be.

13 And it is interesting to note that in paragraph 32
14 of the indictment the Government specifically alleged the
15 materiality as to the issue of whether these were retail
16 or mail-order pharmacies, but there was no such specific
17 allegation regarding the materiality of Mr. Letko's ownership
18 in paragraph 30.

19 That is likely because the mere fact that Mr. Letko
20 may have had some indirect ownership in the A1C Pharmacies
21 could not have been material as a matter of law.

22 As we laid out in our brief, the any-willing-provider
23 law required the PBMs to allow any qualified pharmacies into
24 their networks.

25 And under the law the only way the A1C Pharmacies

1 could have denied a contract -- could have been denied a
2 contract with the PBMs based on Mr. Letko's ownership was if
3 Mr. Letko was an excluded person under the Medicare rules,
4 which he was not.

5 Simply having the last name of Letko was not a
6 sufficient basis under the law for the PBMs to deny the
7 A1C Pharmacies entry into their systems, and it should not
8 be the basis of a criminal charge in this case.

9 Second, we challenge the allegation in paragraph 32
10 regarding whether the A1C Pharmacies properly disclosed to the
11 PBMs the fact that they were mail-order pharmacies as opposed
12 to retail pharmacies.

13 Mr. Letko could not have possibly or reasonably
14 known that claiming to be a retail pharmacy as opposed to a
15 mail-order pharmacy would result in a criminal charge.

16 As we laid out in our brief, the Medicare rules and
17 regulations gave only a vague definition of what constituted
18 a retail pharmacy and zero definition of what constituted a
19 mail-order pharmacy.

20 And moreover, in terms of, you know, a real-world
21 distinction between a mail-order pharmacy and a retail
22 pharmacy is not as simple as you might think. In the real
23 world there are retail pharmacies that mail their
24 prescriptions to their patients. And so that distinction,
25 even in the real world, is not easy to make, let alone under

1 the Medicare rules and regulations.

2 And so we believe that it is fundamentally unfair
3 to subject Mr. Letko to criminal liability for failing to
4 distinguish between these two terms that the very Medicare
5 rules and regulations fail to clearly define themselves.

6 And we do understand that there is case law that
7 says that the knowledge and intent requirements of the fraud
8 statutes cure some of these issues, but frankly, that is --
9 that's cold comfort for someone like Mr. Letko to say to them
10 years later, you know, "Hey, don't worry, you can have a
11 defense at a criminal trial about these issues because we have
12 to prove knowledge and intent," when years ago he is trying to
13 navigate these rules and regulations and figure out whether he
14 is a retail or a mail-order pharmacy.

15 And as the Supreme Court said in the Kolender case,
16 the underlying principle is that no man shall be held
17 criminally responsible for conduct which he could not
18 reasonably understand to be proscribed. And we feel this
19 is exactly what is happening here in the allegation in
20 paragraph 32.

21 Our third challenge was to the false test claim
22 allegations in paragraphs 33 and 34. And on this point the
23 Government in their response misconstrues -- misconstrues our
24 basic argument. Our argument is not that the allegations
25 about test claims should be dismissed because test claims were

1 an ordinary and accepted practice in the pharmacy industry.
2 While it is true that they were, test claims are an ordinary
3 and accepted practice in the industry, our argument here is
4 that the allegations must fail because test claims, even if
5 they were somehow false and fraudulent, did not deprive anyone
6 of money or property.

7 Test claims, as their term suggests, are simply a
8 way for a pharmacy to test whether a prescription might be
9 covered, and if so, how much it might cost. So test claims
10 are not actual claims that are being submitted for
11 reimbursement.

12 So by their very definition, test claims could not
13 have caused a PBM or plan sponsor or Medicare to actually pay
14 out anything to the A1C Pharmacies. So even if Mr. Letko was
15 involved in submitting a false and fraudulent test claim, that
16 could have not have -- that could not have violated the fraud
17 statutes because the object of submitting a test claim was not
18 to gain money or property.

19 Our final challenge is to the allegations in
20 paragraphs 35 and 36 regarding refills and transfers without
21 patient consent. Those allegations both rest on the same
22 flawed attempt to criminalize what are essentially violations
23 of civil regulations and guidance documents. There is
24 obviously no criminal statute that says it's a crime to send
25 a refill to a patient or transfer a patient without that

1 patient's consent.

2 And so, as we laid out in our brief, there was this
3 complex and constantly changing labyrinth of Medicare rules
4 and regulations and guidance documents that -- some of which
5 contained these prohibitions against sending refills or
6 transferring patients without their consent. But the DOJ's
7 own policy manual warns about this very situation when it
8 states "Criminal and civil enforcement actions by the
9 department must be based on violations of applicable legal
10 requirements and not mere compliance with guidance documents
11 issued by federal agencies."

12 And the reason why the DOJ has that policy is because
13 it recognizes the fact that mere guidance documents are --
14 excuse me -- these guidance documents, they're constantly
15 changing. They are not fully vetted by Congress. And they
16 may conflict with other rules and regulations that might be
17 out there.

18 Moreover, there may be competing policy interests
19 that are at play with the policies that are prescribed in
20 these guidance documents.

21 For example, there's a competing policy interest
22 in making sure that patients get refills for prescriptions
23 that they need on a regular basis, and so as a result, these
24 allegations which are built -- in paragraphs 35 and 36 --
25 which are built on civil guidance documents could not have

1 possibly given fair notice to Mr. Letko that he might some day
2 be here in a criminal trial having to defend against these,
3 you know, alleged violations of civil guidance documents.

4 That's all I have, your Honor. And obviously if you
5 have any questions, I'm happy to address those.

6 THE COURT: Thank you, Mr. Eppel.

7 Let's see. Ms. Webster, do you have anything that
8 you would like to contribute to this motion argument?

9 MS. WEBSTER: No, your Honor. I don't have anything
10 to add. Thank you.

11 THE COURT: Thank you.

12 Mr. Burdick.

13 MR. BURDICK: No, your Honor. He covered everything
14 and so --

15 THE COURT: Mr. Burdick, I can't hear you.

16 MR. BURDICK: No, I don't, your Honor. And I think
17 that his -- he covered everything in his motion and his reply
18 brief to the Government's response in opposition. He covered
19 everything that I would have covered.

20 THE COURT: All right. Thank you.

21 MR. BURDICK: I have nothing to add.

22 THE COURT: Thank you.

23 Mr. LaRene?

24 MR. LaRENE: Thank you. No.

25 THE COURT: Mr. Berman.

1 MR. BERMAN: No, thank you.

2 THE COURT: Very well. Ms. Dubal.

3 MS. DUBAL: Thank you, your Honor.

4 Your Honor, as far as this motion is concerned, the
5 United States -- the defendant has not raised in his -- in his
6 reply brief any additional arguments that were not already
7 briefed by the United States in their response, and so I will
8 just take a few moments to just quickly summarize some of the
9 key points of the United States' response and go from there.

10 First and foremost, as it pertains to whether or not,
11 you know, the crime is sufficiently alleged, the United
12 States' position is that it is. The indictment is drafted
13 sufficiently. The elements of the offense properly track the
14 relevant language of the statute. Defendant is informed of
15 those charges and it allows -- puts him in a position to
16 plead, you know, an acquittal of conviction.

17 And the main arguments that the defense makes are
18 really issues of fact for the jury to decide. They are not
19 legal issues to be decided at this stage in the litigation,
20 and that would be pretrial.

21 As far as materiality, materiality is properly
22 alleged in the indictment in paragraph 25. It's a question
23 for the jury to decide whether the false assertions in
24 concealing the true ownership interests in each A1C Pharmacy
25 would have affected the PBM's decision to contract with the

1 A1C Pharmacies. And the answer to this question tends to
2 prove materiality of the scheme and the defendants' intent
3 in submitting medically unnecessary prescriptions for
4 Lidocaine as well as --

5 (Reporter seeks clarification of the record.)

6 MS. DUBAL: -- diabetic testing supplies.

7 And I apologize. I will talk slower. I apologize
8 for that.

9 In terms of any vagueness argument that's made, the
10 vagueness argument that is made with regard to classifying
11 the pharmacies as mail order versus retail, again, your Honor,
12 this is -- you know, the Government is required to prove
13 beyond a reasonable doubt that the defendants acted knowingly
14 and willfully to defraud the PBMs as well as Medicare, which
15 requires the Government to prove that by deceiving the PBMs in
16 contracting with the pharmacies, concealing their ownership
17 and misclassifying the pharmacies, that they were actually
18 able to further the scheme to defraud by distributing these
19 medically unnecessary medications and diabetic testing
20 supplies and thereby their -- the submission of the false
21 claims was knowing and intentional.

22 The defendants are free to argue at trial that
23 mail order -- classification of mail order versus retail was
24 confusing. They are free to argue that at trial during cross
25 examination, and then the jury can decide what weight to give

1 this evidence as it pertains to the defendants' intent in
2 committing this crime.

3 And then in terms of the arguments pertaining to test
4 claims and the use of test claims, the use of test claims in
5 this case is not the object of this conspiracy. The object of
6 this conspiracy was to defraud the Medicare program so that
7 the defendants could actually obtain money, which is clearly
8 detailed in the indictment. It was -- the use of these test
9 claims is one of the many steps that the defendants took to
10 execute this scheme to defraud, and it's not an issue of law
11 for the Court to decide at this time.

12 And then lastly, in terms of the defendants'
13 arguments pertaining to auto refills as well as the patient
14 transfer program being civil violations that are not criminal,
15 the United States has followed the Justice Manual guidelines
16 in charging this case as a criminal violation, and the
17 defendants are not being charged with healthcare fraud as a
18 result of the civil -- any type of civil violations.

19 The auto refill program and the practice of patient
20 transfers is circumstantial evidence of the defendants' intent
21 and proves the materiality of the fraudulent scheme in
22 perpetrating this fraud.

23 And this was, again, one of the many steps the
24 defendants took to perpetrate this fraud. The weight to give
25 that evidence is for the jury to decide.

1 And so, your Honor, for all of those reasons the
2 defendant -- the United States would ask that you -- that this
3 Court deny the defendants' motion to dismiss Count 1 of the
4 conspiracy.

5 THE COURT: Thank you, Ms. Dubal.

6 Mr. Eppel, any rebuttal?

7 You're muted, sir.

8 MR. EPPEL: I apologize. Nothing to add, your Honor.

9 THE COURT: Very well. And would anybody else like
10 to be heard? If so, raise your hand.

11 And no hands are raised.

12 Thank you.

13 The motion is presented under Rule 12 of the Federal
14 Rules of Criminal Procedure, specifically Rule 12(b)(3)(B)(v),
15 and the challenge is whether the indictment, that is, Count 1
16 of the indictment adequately states an offense.

17 The indictment, it's well known, states an offense if
18 it contains the elements of the offense charged; and secondly,
19 fairly informs the defendant of the charge against which he
20 must defend; and third, enables him to plead an acquittal of
21 conviction in bar of future prosecutions for the same offense.

22 The indictment in this case charges essentially
23 conspiracy in Count 1. Let me read the exact label.

24 "Conspiracy to commit healthcare fraud and wire fraud."

25 And the indictment proceeds through paragraphs 24 and

1 following, incorporating paragraphs 1 through 23 to describe
2 the manner and means of the alleged conspiracy.

3 The defendant makes essentially four arguments that
4 the Government has failed -- or the grand jury has failed to
5 set out a crime under Section 1349 of Title 18 in the various
6 paragraphs in Count 1 of the indictment.

7 The one principle that perhaps governs the decision
8 in this motion is that courts, when evaluating a motion to
9 dismiss based upon the sufficiency of a charge in the
10 indictment -- in an indictment -- do not evaluate the evidence
11 upon which the indictment is based.

12 The elements of healthcare fraud are, first -- I'm
13 sorry -- the elements of conspiracy to commit healthcare fraud
14 are, first, an agreement between two or more persons; and
15 secondly, knowingly and willfully to execute or attempt to
16 execute a scheme or artifice to defraud any healthcare benefit
17 program or obtain by means of false or fraudulent pretenses,
18 representations, or promises any of the money or property
19 owned by or under the custody or control of a healthcare
20 benefit program in connection with the delivery of or payment
21 for healthcare benefits, items, or services.

22 An indictment will usually be sufficient if it states
23 the offense using the words of the statute itself as long as
24 the statute fully and unambiguously states all of the elements
25 of the offense. Here the indictment tracks the statutory

1 language verbatim, framing both a specific factual background
2 of the alleged fraudulent transactions and the rough date
3 range of the scheme.

4 Courts have repeatedly held that charges of
5 healthcare fraud conspiracy are adequate when the indictment
6 alleges the time frame of the scheme, identifies the
7 perpetrators of the alleged victims, and charges that the
8 defendants submitted claims for services or items that were
9 medically unnecessary.

10 The indictment here alleges that the defendants
11 engaged in a scheme between the end of 2013 and the end of
12 2018 to submit claims to pharmacy benefit managers for refills
13 of medically unnecessary prescription drugs and diabetic
14 testing supplies purportedly for beneficiaries who never asked
15 for them and some of whom were deceased.

16 The Government also recites numerous other details
17 of the factual background of the scheme, including the
18 defendants' deceptive representations about other
19 circumstances, such as the alleged concealment of Defendant
20 Letko's ownership of -- ownership positions in pharmacies
21 which, had the benefit program known about, would have caused
22 them to decline any dealings with the entities due to his past
23 involvement in other fraudulent conduct.

24 Those circumstances, whether or not per se unlawful,
25 are relevant to prove the defendants' intent to carry out a

1 fraudulent scheme, since they evidence a willingness to engage
2 in several forms of misrepresentations and obfuscation in the
3 course of their operations.

4 But the principle proofs of the criminal fraud
5 charged in the indictment presumably will come from the
6 voluminous records of benefits claims that the Government has
7 produced in discovery, many of which allegedly were for
8 medically unnecessary prescription items.

9 The evidence of lack of patient consents similarly
10 will be offered to bolster the showing that the items were
11 medically unnecessary, a conclusion that obviously is rendered
12 more credible by evidence that the recipients never asked for
13 the items, and in some cases were persuaded to accept them and
14 not return them only by the improper waiver of co-payments by
15 the defendants.

16 The lack of any medical necessity also certainly
17 would be supported by proofs that, in some cases, the
18 purported recipients were deceased, and therefore, could have
19 no conceivable medical use for any items delivered by the
20 defendants.

21 And then, lastly, the defendants' arguments bearing
22 primarily on whether certain specific conduct alluded to in
23 the indictment may comprise legally sufficient proof of
24 fraudulent conduct do not supply any proper ground for
25 pretrial dismissal of a charge that otherwise was adequately

1 pleaded.

2 So with respect, the Court will deny the motion to
3 dismiss Count 1 of the indictment, which is Docket Number 84.

4 I see that Mr. McCormack has joined us. In that
5 case, we will turn to Defendant Letko's motion to compel
6 disclosure of the Brady materials, Docket Number 82.

7 And so, Mr. Donnini, I think that is your motion to
8 argue; is that correct?

9 MR. DONINNI: Yes, your Honor. Thank you.

10 THE COURT: You may proceed.

11 MR. DONINNI: Sure.

12 Before I do, I know that Susan said you were going to
13 take a break at 2:30. It's 2:32. Is that no longer an issue?

14 THE COURT: Well, it might be. Can you just stand by
15 for one second and I can tell you?

16 MR. DONINNI: Yes, sir.

17 (Recess taken from 2:32 p.m. to 2:37 p.m.)

18 THE COURT: Counsel, I'm sorry for the delay.
19 I appreciate your accommodation.

20 Mr. Donnini, go ahead on the motion to compel
21 disclosure of Brady materials, please.

22 Are you ready to proceed?

23 MR. DONINNI: Yes, sir. Thank you, your Honor.

24 THE COURT: Okay.

25 MR. DONINNI: So, your Honor, this motion essentially

1 asks for two things.

2 One is disclosure, identifying and disclosing to us
3 Brady materials within the non-produced material -- and that's
4 important -- the non-produced items that have not been
5 produced to the defense.

6 THE COURT: Okay. What do you characterize as
7 non-produced materials?

8 MR. DONINNI: So basically that falls into, in my
9 mind, two categories, your Honor. One is the category of
10 documents that have been made available for inspection here
11 in Detroit, as well as in New York and New Jersey, is my
12 understanding. So that's one category. The second category
13 is anything else that the Government has possession, custody,
14 and control over.

15 And, importantly, I don't define the Government as
16 Ms. Dubal and Mr. McCormack; I define the Government as the
17 Government. And the Government here, not only is there an
18 Eastern District of Michigan investigation, but there was a
19 District of New Jersey investigation, a District of Georgia
20 investigation. And they all seem to be coordinated efforts,
21 because many of those search warrants that were executed
22 across the country happened on the same day, May 4, 2017.

23 THE COURT: Okay. Let's back up a couple of steps,
24 please, Mr. Donnini.

25 The items made available in Detroit are made

1 available in Detroit. You don't characterize that as
2 non-produced items, do you?

3 MR. DONINNI: I do categorize it as non-produced
4 because it's -- first of all, I would say that we have -- as
5 the Government puts in their response, so far we have received
6 and produced to us ten different productions -- I think an
7 eleventh came in yesterday -- totaling well in excess of
8 2.1 million pages of materials, so we have plenty to sift
9 through in the materials that have been produced to us.
10 Again, our motion has nothing to do with that.

11 THE COURT: And you're saying there are -- are there
12 other items in Detroit lodged somewhere here that have not
13 been turned over to you or made available for you to look at?

14 MR. DONINNI: They're made available for us to
15 inspect.

16 THE COURT: So if they haven't turned it over to you
17 via some digital production but made it available for you to
18 look at in Detroit, are you characterizing something like that
19 as non-produced items?

20 MR. DONINNI: I am, your Honor.

21 THE COURT: All right. And so much the more so for
22 the New York and New Jersey lodged materials?

23 MR. DONINNI: Yes, your Honor.

24 THE COURT: All right.

25 MR. DONINNI: And I don't know how much detail you

1 want me to go into, your Honor, but in terms of the items in
2 Detroit we have boxes of materials and we now know 137 boxes
3 from what was seized at AAMS, All-American Medical Supplies in
4 Miramar, Florida. We have an additional 67 boxes of materials
5 that were seized from AMP, the Warren, Michigan pharmacy here,
6 which is one of the A1C Pharmacies which is the most, I think,
7 prevalent in this, in the indictment. So that's the hard-copy
8 stuff.

9 But it's not limited to that, your Honor. We have
10 got call center recordings of unknown volume, and we have
11 electronic evidence that I frankly don't have any handle on.
12 Maybe I missed something in the letters and in the response
13 from the Government, but the electronic evidence that is
14 available for inspection, I don't have a handle on what that
15 is and how much that entails.

16 So as far as I'm concerned, just in Detroit, what's
17 available for inspection is a great volume of materials. And
18 again, that's in addition to the over 2.1 million pages worth
19 of materials that we have that we're working through to the
20 best of our ability. You know, we've had some problems
21 ingesting that. I'm not going to waste the Court's time with
22 that, but that's got to be our first focus. And so we have
23 not made arrangements yet to even go look at this stuff that's
24 available for inspection.

25 Obviously, the pandemic has added to those

1 complications, but even if there weren't a pandemic, we would
2 focus on what has been given to us first. But all this other
3 stuff that's just been made available for inspection, our
4 position is, the Government, if it knows of Brady within
5 those materials or will become aware of Brady within those
6 materials, they shouldn't be able to abdicate their
7 responsibility by simply saying it's available for inspection.

8 THE COURT: So do you intend to look at this material
9 in Detroit?

10 MR. DONINNI: Yes, we do, your Honor. We just
11 haven't gotten to that point yet.

12 THE COURT: All right. Continue with your argument.

13 MR. DONINNI: Sure.

14 So, I mean, largely that covers the -- much of what I
15 was going to have prepared, and I just think that we're not --
16 as the Government says in their -- on their response brief,
17 that we're trying to absolve ourselves of our responsibility
18 to prepare and that we're trying -- we're asking them to sift
19 through the evidence to locate anything favorable to the
20 defense.

21 Again, I know I'm repeating myself, but we're not
22 asking them to do anything with respect to what they have
23 given us. We know our obligations. We're going through those
24 materials as best we can. It's the things that are not
25 immediately available to us even in Detroit. It's close, but

1 we do have some limitations on being able to go see it even
2 now.

3 THE COURT: Such as?

4 MR. DONINNI: Much the harder to go to New York or
5 New Jersey.

6 THE COURT: Yeah. Let's just focus on Detroit for a
7 minute.

8 What are your limitations in being able to go inspect
9 those items?

10 MR. DONINNI: Well, your Honor, again, I said before
11 and I'll say it again, I think that we wouldn't even be to
12 that point. While the pandemic has certainly slowed down our
13 efficiency and our ability to get things done as we would in
14 normal terms, but, you know, just getting -- whether it's one
15 or two of us, I have not coordinated logistics.

16 Are we going to be in there with another agent? Are
17 we going to be sitting there with masks on all together in a
18 room? Does the room have windows? I'm assuming it doesn't.
19 I'm assuming, you know, we're going to be in the basement of a
20 building somewhere. And, you know, there's just -- is it
21 going to be one person from our team? Are we going to have
22 multiple people? These are things we have to think through,
23 but -- you know, we can get it done, but again, with all
24 that's going on on that front, we have put that to the side
25 for now.

1 THE COURT: Well, sooner or later I would think to
2 prepare you're going to want to spend time with these
3 documents and look through them, aren't you?

4 MR. DONINNI: Yes, your Honor.

5 THE COURT: And so I would suggest that sooner would
6 be a better watchword here in terms of making a plan. Now,
7 you know, the law is pretty clear that the Government is not
8 required to curate this material and give you the good stuff.

9 Of course, if something is obviously exculpatory, the
10 Government has an obligation to point it out, I suppose. But,
11 you know, sometimes beauty is in the eye of the beholder and
12 what the Government -- what you might think is exculpatory,
13 the Government might disagree with. So I think that the cases
14 are -- point out the dicy nature of an order that requires the
15 Government to just require -- just turn over material that's
16 exculpatory, and that obligation can be satisfied by turning
17 over what the Government has so you can examine it for
18 yourself.

19 Certainly they can't withhold anything, but -- and I
20 understand in a documents case that's heavily laden like
21 this, it's quite burdensome, but that -- the inspection
22 process is really a function of time and resources; right?

23 MR. DONINNI: Yes, your Honor. And I agree with you,
24 we need to turn to that again. We have lots to do with what
25 has actually been produced to us, but we do intend to turn to

1 those materials that are only available for inspection.

2 I guess the only point I would add is, I agree
3 that -- let's assume the Government is aware of materials that
4 are -- would fall under Brady within documents that have only
5 been made available for inspection or not yet made available
6 for inspection. I don't think their obligation is satisfied
7 by merely saying, "Here's the treasure trove of materials,"
8 137 boxes, 67 boxes, 43 boxes, and an unknown number of
9 electronic documents, and say, "Have at it." I think their
10 obligation, if they know or become aware, is greater than just
11 simply making it available for inspection.

12 THE COURT: Do you have a case that says that?

13 MR. DONINNI: Your Honor, I am more relying on logic
14 and what I think is appropriate. I do think that the cases
15 we cited in our brief support that position, but something
16 specific as to that, no, your Honor.

17 THE COURT: Well, people that don't have cases
18 usually turn to logic.

19 MR. DONINNI: Sometimes logic makes sense, and
20 fairness.

21 THE COURT: Well, no, I'm a proponent of logic, but
22 it's more helpful to make a decision with a case.

23 MR. DONINNI: Understood, your Honor.

24 THE COURT: All right, Mr. Donnini.

25 What's the situation about New Jersey and New York?

1 MR. DONINNI: Well, again, your Honor, with that,
2 that is -- those -- it's my understanding those are the
3 documents that were seized in connection with the, I'll call
4 it, parallel or coordinated New Jersey investigation. And I
5 believe -- and the Government will certainly correct me if I'm
6 wrong -- I believe that investigation is more focused on Jim
7 Letko's brother and not Mr. Letko in this case specifically;
8 however, there may be materials within that investigation that
9 may have important information for us. So again --

10 THE COURT: This is the New Jersey compilation?

11 MR. DONINNI: Yes, your Honor.

12 THE COURT: All right. Are those electronic
13 documents or paper documents?

14 MR. DONINNI: My understanding is, there are 43 boxes
15 of paper documents, an unknown quantity of electronic
16 evidence -- and I put that in quotes because that's what
17 I read in the Government's response -- and then a data
18 center that hosted e-mails for various entities related to
19 Mr. Letko's brother.

20 THE COURT: The data center is in New York, though;
21 right?

22 MR. DONINNI: The data center is in New York. The
23 electronic evidence, I believe, is in New York. The hard copy
24 documents are in either Edison or Bridgewater, New Jersey.

25 THE COURT: In some agency office?

1 MR. DONINNI: I believe so, your Honor.

2 THE COURT: All right. Anything else, Mr. Donnini?

3 MR. DONINNI: Not on that, your Honor. However, I
4 would like to make a few comments on the agent notes.

5 THE COURT: Oh, yeah. Okay. Go ahead.

6 MR. DONINNI: So on this -- and I'll be brief -- the
7 Government here has already agreed to preserve the agents'
8 rough notes. And they stated in their brief that to the
9 extent that they become aware of Brady, exculpatory evidence
10 within rough notes, it will be produced.

11 And then another argument they make in their brief is
12 that it's the Government that gets to decide which information
13 must be disclosed and the prosecutor's decision on disclosure
14 is final.

15 Okay. So putting those, all those together, the
16 problem with that is that if the Government who has access to
17 these handwritten notes never looks at them, there is never
18 going to be anything that's disclosed to us that may be in
19 those handwritten notes.

20 So I understand the case law that says if the 302
21 exists then there is no violation if the handwritten notes are
22 destroyed, but here we have a situation where the handwritten
23 notes are being preserved.

24 And so what we're asking is, we will do the work.
25 We want to look through the 302s and the handwritten notes,

1 because obviously a witness interview that the Government
2 conducts is not the witness's statement, but the handwritten
3 notes are something that are contemporaneous to the interview.

4 The 302 is something that the agent creates after the
5 interview itself. And he or she may bring other aspects,
6 other knowledge of the case into that memo-writing process
7 that may very well not be there when they are sitting in the
8 room with the witness. So, in my opinion, the handwritten
9 notes are a better reflection. Again, they are not witness's
10 statements, necessarily, but they are a better reflection of
11 what took place in that room than potentially the 302. And I
12 think that it's -- again, whether we want to call it logical
13 or common sense, that it makes sense for us to be able to see
14 that, to compare it, and to determine for ourselves whether
15 there may be Brady that's within those materials.

16 And in our reply, between the time of the filing of
17 our motion and the filing of our reply, we did receive the
18 handwritten notes from the interviews of the co-defendants in
19 this case, and we did point out just a couple of instances
20 from Mr. Lazeki's 302 and handwritten notes where we showed
21 one instance where something was added to the 302 which, in
22 our opinion, was more favorable to the Government -- so it
23 wasn't in the notes, but it was in the 302, and it was more
24 favorable to the Government -- and another instance where
25 something was in the notes but excluded from the 302 which was

1 actually favorable to the defense.

2 So these may not be earth-shattering instances of
3 discrepancies, but it is an area where we believe we should be
4 able to see those materials in order to test what happened
5 when those individuals were interviewed by the Government.
6 And we believe that the Government should produce those
7 handwritten notes because they have been preserved, because
8 they exist, presumably, for all witnesses that the Government
9 intends to call at trial.

10 THE COURT: Okay. Anything else, Mr. Donnini, on
11 this Docket Number 82?

12 MR. DONINNI: No, your Honor. Thank you very much.

13 THE COURT: Ms. Webster, anything on this motion?

14 MS. WEBSTER: Nothing further. Thank you, your
15 Honor.

16 THE COURT: Mr. Burdick?

17 MR. BURDICK: No, sir. Thank you.

18 THE COURT: Mr. LaRene?

19 You're muted, so I --

20 MR. LaRENE: Thank you. No.

21 THE COURT: Thank you.

22 And Mr. Berman?

23 MR. BERMAN: No, your Honor. Thank you.

24 THE COURT: Thank you.

25 Mr. McCormack, good afternoon.

1 MR. McCORMACK: Thank you, your Honor.

2 First I want to apologize to the Court and counsel.
3 I'm sorry for the technical issues I experienced logging on.
4 Your staff was able to help me get through it. So again, I'm
5 sorry, your Honor, for wasting your time earlier today.

6 So I would like to just first update the Court, kind
7 of clarify the record in terms of what is where with respect
8 to the non-produced items, the items that have been made
9 available for inspection.

10 In Detroit, your Honor, there's 76 boxes from
11 Florida. There was an error in the Government's motion citing
12 137, but it's actually 76 boxes from Florida, 67 boxes that
13 were seized pursuant to a search warrant in Michigan, and then
14 additionally there's -- the electronic evidence solely
15 consists of the telephonic recordings which the Government
16 obtained from the defendants' VICIbox server. It took some
17 time, but that was uploaded to a computer at HHS here in --
18 there in Detroit. I'm sorry, I'm not there, your Honor.

19 And that server was ultimately returned back to the
20 defendants, so the defendants have access to the VICIbox
21 server right now, so they could listen to those recordings
22 without having to go to the Detroit HHS to review those.

23 With respect to the --

24 THE COURT: Who has custody of that?

25 MR. McCORMACK: Your Honor, I'm not sure who it was

1 returned to. I know it was returned in June of 2017. I'm not
2 sure where it stands today amongst the co-defendants or with
3 the company, your Honor.

4 THE COURT: Hmm. Mr. Donnini, are you aware of that?

5 MR. DONINNI: Your Honor, I'll have to inquire. I
6 did hear that. I don't know if the company has it. You know,
7 obviously the company is not what it once was, but I will
8 certainly chase that down, because if I can access the audio
9 recordings not having to sit at a standalone computer station
10 at the Government's offices, I intend to do that.

11 THE COURT: Okay. Thank you.

12 Mr. McCormack, how are those audio recordings stored
13 in the Government's possession?

14 MR. McCORMACK: They are stored on a computer, your
15 Honor. The Government had to subscribe to VICIdial, which is
16 the software platform that uses VICIbox, and then you can sort
17 through the recordings by date, by the phone number, even by a
18 campaign like, for example, "Lidocaine campaign," and one can
19 sort through the phone calls to find pertinent details, if,
20 for example, you're looking for a specific phone call with an
21 identified patient, your Honor. And they are in Detroit HHS
22 OIG on a standalone computer, your Honor, right now.

23 THE COURT: So that database could be replicated and
24 turned over?

25 MR. McCORMACK: It could not, your Honor. It

1 requires the software, which I indicated we had to subscribe
2 to. It took us a number of months to even get it into a
3 position where we could access it ourselves. The best we were
4 able to do is have it accessible on the standalone computer at
5 the Detroit HHS office, your Honor.

6 THE COURT: Standalone computer meaning one that's
7 not connected to the internet?

8 MR. McCORMACK: It's a computer. The only thing
9 that's on it, my understanding, your Honor, is the VICIdial
10 software with access to the recordings.

11 THE COURT: Is that software proprietary?

12 MR. McCORMACK: I believe so, your Honor. Hence, we
13 had to -- we had to subscribe in order to get access. And
14 like I said, it took months to actually upload the phone calls
15 so we were in a position to review them.

16 THE COURT: All right. So if you returned the raw
17 data to the defendant, the defendant might not even have
18 access to it without subscribing to the proprietary software;
19 is that correct?

20 MR. McCORMACK: Well, your Honor, they already --
21 it's our understanding they already subscribed to it in order
22 to have the platform and to use it on their own, so they could
23 either resubscribe or maybe they're currently still subscribed
24 to the software; that, I don't know. But I know at one point
25 they were subscribing to VICIdial.

1 THE COURT: All right. Go ahead. What else?

2 MR. McCORMACK: Thank you, your Honor.

3 With respect to New Jersey, there's 43 boxes. That's
4 at the HHS OIG in Edison, New Jersey. The Government is
5 currently exploring the possibility of having them transported
6 to Detroit on a temporary basis. I was hoping to have an
7 answer on that by this hearing today, your Honor, and despite
8 my best efforts talking to peopling in New Jersey, I was not
9 able to get an update whether that's possible.

10 With respect to the data, your Honor, the data --

11 THE COURT: Wait a minute. What do you mean, if it's
12 possible or not? What would be the problem?

13 MR. McCORMACK: I just -- I think logistically,
14 potentially, your Honor -- I mean, we were able to ship
15 documents from Miami up to Detroit. So as there is a -- that
16 investigation is ongoing, you know, and they are taking the
17 lead on it, we just wanted to connect with them to make sure
18 it's possible that we could do that. And we're still, like I
19 said, awaiting word to see whether it is possible we could
20 transport them to Detroit to ease the review for at least
21 counsel for four of the five defendants.

22 THE COURT: All right. What else?

23 MR. McCORMACK: With respect to the data in New York,
24 your Honor, so there is -- as defense counsel pointed out,
25 there is data that was seized from e-mails, an e-mail server

1 related to Defendant -- I'm sorry -- Defendant Letko's
2 brother, Jim Letko. That data was, at one point, on a
3 Relativity database in New Jersey.

4 That Relativity database has been deactivated and the
5 data was taken off a server. The District of New Jersey is in
6 the process of uploading that data to another server in an
7 effort to reactivate the Relativity database. If that occurs,
8 we would be able to produce that to the defendants; however,
9 subject to a filter review would have to happen first, your
10 Honor.

11 And likewise, the data from Amazon Web Services that
12 was believed to be patient files and records relating to
13 prescriptions from Jim Letko's companies, that information is
14 in New York. And my understanding, it has yet to be accessed
15 by anyone due to technical issues. So they're still in the
16 process of trying to access those materials.

17 THE COURT: So you're telling me you haven't even
18 been able to look at it; is that correct?

19 MR. McCORMACK: Correct, your Honor. The Government
20 in this case has not reviewed the New Jersey materials,
21 the hard copy, or the electronic information and -- or the
22 information that was seized pursuant to Mr. Letko's -- John
23 Letko's company that is being housed in New York. That is
24 correct, your Honor, we have not been able to review any of
25 that so far.

1 THE COURT: All right.

2 MR. McCORMACK: And likewise, your Honor, the
3 Government's production is not unduly onerous.

4 As defendant -- as defense counsel indicated in its
5 reply, they tried to distinguish the production here from
6 that in Rorschach (phonetic) by making an argument that Brady
7 requires production as opposed to disclosure, and that is --
8 there is no case that they have cited that supports that
9 notion. And, in fact, the Sixth Circuit said in Presser that
10 Brady requires disclosure of potentially exculpatory evidence.

11 And I wanted to draw the Court's attention to two
12 cases that were cited in the Government's pleadings in support
13 of that motion that Brady does not require production. It can
14 also be met through access to disclosure.

15 And the first is U.S. v. Mmahat, which is spelled
16 M-m-a-h-a-t, for the record. That is cited by both Government
17 and defense, in defense's reply brief. And that was a
18 circumstance, your Honor, in the Fifth Circuit where the
19 Government gave access to half a million documents months
20 before trial to the defense, so did not produce them, merely
21 gave them access, and those records were indexed.

22 And after -- on appeal, your Honor, defense argued
23 that that was a Brady violation, a failure to identify what
24 was potentially exculpatory. And there the Fifth Circuit said
25 essentially, as your Honor has indicated, there's no authority

1 for the proposition that the Government's Brady obligations
2 require it to point to specific documents that were turned
3 over.

4 And the other case, your Honor, is U.S. v. Pellulo,
5 which is P-e-l-l-u-l-o. That's a case out of the Third
6 Circuit, your Honor, where materials were also provided to
7 defense for inspection. In that circumstance the defendant
8 was indicted in Philadelphia, the defendant's principal place
9 of business was in Miami, and the Government provided access
10 to approximately 75,000 pounds of documents in Jacksonville,
11 Florida.

12 So, your Honor, assuming that a box of evidence is
13 approximately 50 pounds, that's approximately 1,500 boxes of
14 evidence that the defense was given access to. The Government
15 produced a partial index of documents; however, the Government
16 even conceded that that index was obsolete.

17 However, on appeal, after the defense argued that was
18 in violation of Brady, that production and failure to identify
19 potentially exculpatory evidence, the Court noted that the
20 Government made the documents available to the defendant and
21 without specifying what was helpful to the defense, which is
22 something that Brady does not obligate it to do.

23 So, your Honor, for those reasons the Government
24 would ask that you would deny the defense request to identify
25 potential Brady materials in what has been made accessible

1 for review for the defense.

2 And then briefly, your Honor, with respect to agent
3 notes, it's clear in the Sixth Circuit that rough notes are
4 not discoverable as Jencks material, so that the defense is
5 essentially trying to argue that they are discoverable as
6 potential Brady material. And as is indicated in our
7 pleading, your Honor, to the extent the Government is aware
8 of Brady information in the rough notes it will certainly be
9 produced.

10 But in support of their argument they cite two
11 examples, your Honor. After the defense filed their motion to
12 compel Brady materials the Government produced approximately
13 38 pages of rough notes relating to interviews conducted with
14 the three co-defendants that made statements, and of those 38
15 pages defense cited two examples that they purport identify
16 potential Brady material.

17 The first is -- the first example with respect to a
18 statement by Mr. Lazeki regarding Jeffrey Roy Kolmer, that --
19 the report itself does not -- includes more than was indicated
20 in the notes. That's not indicative of an inconsistency, your
21 Honor. The whole purpose of notes during an interview are,
22 they are not verbatim transcripts of what was said, they are
23 merely supposed to help jog an agent's memory when they write
24 their report, and that's certainly what appears to have
25 happened in this circumstance. So the absence of something in

1 the notes does not reflect an inconsistency.

2 And furthermore, the second example, your Honor, is
3 equally not persuasive. It is -- essentially defense is
4 trying to characterize that as an omission. So the omission
5 would be that -- an inference that All American Medical was
6 not conducting due diligence with respect to claims; however,
7 the report itself just a couple sentences before the portion
8 that's cited by the defense reads that pharmacists were
9 reviewing prescriptions to make sure that data was reviewed
10 quickly -- correctly, and that on many occasions the data
11 entry team picked the wrong doctors and Emily Lyons caught the
12 mistakes. Certainly it doesn't say that they fixed it, but I
13 think it's implied by those sentences there, your Honor. So
14 that is not -- another example, I think, that does not give
15 light, does not support the defendants' request.

16 So with respect to the agents' rough notes, your
17 Honor, there is simply no vehicle at this juncture to entitle
18 the defendants to the notes.

19 And for all those reasons, your Honor, the Government
20 asks that you deny the defendants' motion.

21 THE COURT: Mr. McCormack, have you read the rough
22 notes?

23 MR. McCORMACK: I have read the ones that have been
24 produced, your Honor, the defense -- regarding the defendants.

25 THE COURT: Have you read the other ones?

1 MR. McCORMACK: I have not, your Honor.

2 THE COURT: Can you tell me how voluminous that
3 collection is?

4 MR. McCORMACK: I am not in a position where I can
5 answer that, your Honor, with respect to the notes that have
6 been preserved.

7 THE COURT: You mean you're not in a position because
8 you don't know?

9 MR. McCORMACK: Yes, your Honor.

10 THE COURT: All right.

11 Mr. Donnini, anything further?

12 MR. DONINNI: Your Honor, I'll stand on our brief and
13 stand on our argument previously made. But thank you for the
14 opportunity.

15 THE COURT: All right. I'm concerned about the
16 materials in New York and New Jersey being made available.
17 I'm not going to require the defendants to go there to examine
18 them. I will give the Government the option of either
19 producing the paper materials in New Jersey by transporting
20 them -- I'm sorry. Let me say this more clearly.

21 I'll give the Government the option, with respect
22 to the materials now located in New Jersey, of either
23 transporting them to Detroit within the next 60 days to allow
24 the defendants to inspect them or the Government can inspect
25 them in New Jersey and identify any information that's

1 potentially exculpatory. I presume the Government doesn't
2 want to have the burden of the latter option, and so I'll
3 expect that some arrangements will be made.

4 The burden is on the defendants, however, to make
5 arrangements to inspect the materials that are in Detroit
6 and made available to it, and however you do that, either with
7 an investigator or a paralegal or with some joint defense
8 agreement to handle it in some more expeditious way, you need
9 to get on that right away.

10 With respect to the rough notes, they have been
11 preserved. The Government takes the position, it sounds like,
12 that they may be Jencks material. And if that's the case,
13 I'll order them produced consistently with the Jencks Act, and
14 that is, after a witness testifies on direct examination those
15 materials will be produced before cross examination.

16 That could extend the timing of the trial quite a
17 bit, because I would give the defense an adequate amount of
18 time to review those things, and so perhaps an accommodation
19 can be made sometime closer to the trial date, but I will not
20 order them produced right now.

21 So to the extent that that relief is a partial grant
22 of the motion, it is so ordered. But in all other respects,
23 the motion is denied.

24 Let's see. The next one is a motion to strike
25 surplusage. That's Docket Number 83.

1 And I think, Mr. Donnini, you said you were taking
2 that argument?

3 MR. DONINNI: Yes, your Honor. Thank you.

4 THE COURT: Okay. You may proceed.

5 MR. DONINNI: Okay. Your Honor, again, this is a
6 motion under Rule 7(d). And what we have argued in our brief
7 is that both the indictment and the seizure affidavits that
8 came a couple years prior, we believe it's clear that the
9 Government's investigation is about Medicare Part D.

10 There are five references to diabetic testing
11 supplies in the indictment, paragraphs 33, 35, 37, 40, and 43.

12 And again, with Part D, the case is about the A1C
13 Pharmacies' relationship with private insurers and the PBMs
14 that the insurers contract with.

15 The Part B, Medicare Part B is different and that
16 covers durable medical equipment and diabetic testing
17 supplies, and that is where it's directly administered by
18 CMS or the Government, so there is billing directly to
19 the Government.

20 In essence, your Honor, we believe that introduction
21 of allegations of false and fraudulent diabetic testing
22 supplies, which is a Medicare Part B issue, is going to do
23 nothing but confuse the jury, waste time, and ought to be
24 excluded and stricken from this indictment because it has
25 nothing to do with the claims that were submitted for

1 prescriptions under the Medicare Part D program.

2 As we -- I think it's important, and I'm going to
3 just go ahead and read a sentence on page 1 of the response,
4 the Government's response, and this is how they lead their
5 argument. They say: "The defendants engaged in a massive
6 multi-pronged healthcare fraud scheme that involved dispensing
7 expensive medications such as Lidocaine and diabetic testing
8 supplies without patient consent resulting in over \$80 million
9 worth of false and fraudulent claims being paid."

10 Your Honor, the argument that the Government really
11 makes, I think, and obviously they can speak for themselves,
12 is that, you know, there's two things going on, and I think
13 one is they talk about diabetes supplies, and we try to make
14 this point in the response, in the reply that, again, testing,
15 diabetic testing supplies are here in one category and
16 diabetes supplies such as these alcohol pads, that is
17 administered under Part D.

18 So it's a distinction worth noting and is important
19 because their secondary argument is that the jury needs to
20 hear about diabetic testing supplies under Part B for context
21 and background and how the A1C Pharmacies acquired their
22 patients and filled prescriptions for diabetic patients.

23 And again, I understand it. The problem is, that's
24 something from our position that's created after the fact.
25 That is nowhere to be found in the indictment. If you look

1 at the indictment, those five paragraphs that I articulated,
2 the -- those paragraphs, and I'm looking just at paragraph 33
3 to start, it says: "Test claims" -- excuse me -- "Caused
4 the submission of false and fraudulent test claims using the
5 physician's MPI for expensive prescription medications and
6 diabetic testing supplies." So -- and that's consistent in
7 35, and 37, and 40, and 43.

8 The allegations in the indictment are that false and
9 fraudulent claims for diabetic testing supplies are what's
10 alleged. And what we're saying is that's Part B, that's not
11 Part D. This case is Part D.

12 And so -- and to be frank, your Honor, you know, I
13 had to learn that, and it took me a while to figure it out,
14 and I do believe that this is something that is unnecessary in
15 this trial, is going to cause confusion, and frankly, ought to
16 be stricken from the indictment because that's what it will
17 accomplish.

18 You know, the Government -- and then I'll just point
19 out one other thing about the Government's argument. The
20 Government says in their brief that a motion to strike should
21 only be granted when it is clear that the language is both
22 irrelevant and prejudicial. But then on the next page, and
23 they are quoting a case, but on the next page they say a
24 prejudice determination is no part of the Rule 7 analysis,
25 and 403 balancing should be conducted during the trial.

1 I mean, in my mind, your Honor, those two really
2 can't coexist, because if a test under Rule 7 -- whether
3 you're going to grant a motion to strike is whether it's
4 irrelevant -- excuse me -- irrelevant and prejudicial, but
5 prejudice is not part of the analysis, then a motion to strike
6 would never be granted upon a pretrial basis, and that can't
7 be correct.

8 So, again, we believe that there are, again, the --
9 and I -- it's in there, I just think it's important, diabetic
10 testing supplies, examples of that are monitors and testing
11 strips and these lancets. Diabetes supplies, which is in the
12 Counts 2 through 6 of the indictment, alcohol pads, alcohol
13 pads are just supplies that help with the prescription. Okay?
14 So they kind of go hand in hand with the prescription and
15 they are part of Part D, but diabetic testing supplies are
16 a different animal altogether. It introduces a totally
17 separate method of how providers are reimbursed, again,
18 directly from the Government, whereas, Part D has this, I'll
19 call it, more complex structure of a pharmacy who contracts
20 with a PBM, who contracts with a private insurer, who
21 contracts with the Government. And it's just a different
22 animal. We believe that's why references to diabetic testing
23 supplies should be stricken.

24 THE COURT: All right. Thank you, Mr. Donnini.

25 Ms. Dubal, are you taking this one or Mr. McCormack?

1 MS. DUBAL: I am, your Honor.

2 THE COURT: All right. You may proceed.

3 MS. DUBAL: Thank you, your Honor.

4 Your Honor, again, you know, the defendant doesn't
5 raise any issues, any new issues that weren't already raised
6 in their initial motion, so the United States is going to
7 primarily rely on its response; however, I will just highlight
8 a few points, and I will address -- just actually, your Honor,
9 I will address one issue that was raised in the defendants'
10 reply related to an argument that they made on the U.S. v.
11 Buck. That's B-u-c-k.

12 So as is stated in the Government's response, your
13 Honor, the reference to diabetic testing supplies is relevant
14 because it does provide the necessary background to the jury
15 to understand how this whole scheme at A1C Pharmacies work
16 and how --

17 THE COURT: I don't know, Ms. Dubal, if the court
18 reporter is having the same trouble, but it sounds like your
19 voice is dropping off and it makes it difficult to hear.

20 MS. DUBAL: Oh.

21 THE COURT: It could be my --

22 MS. DUBAL: I apologize.

23 THE COURT: -- equipment or it could be yours, but
24 I'm going to ask you to try to keep your voice up, please.

25 MS. DUBAL: Absolutely, your Honor. Thank you for

1 letting me know. I apologize for that.

2 Ms. Twedt, are you having any issues -- are you
3 having issues with that as well?

4 (Discussion held off the record.)

5 MS. DUBAL: Okay. Thank you.

6 So, your Honor, as I was saying, that the reference
7 to diabetic testing supplies is relevant and evidence related
8 to -- you know, the diabetic testing supplies would be subject
9 to proof at trial, and so under the case law it cannot be
10 considered as surplusage.

11 And really, the crux of the issue here for the
12 defendant is that they are taking issue with the
13 characterization of diabetic testing supplies, and quite
14 frankly, the case law does not support striking language from
15 an indictment or excluding any mention of such a thing on this
16 basis. And quite frankly, defendant cites no case law to
17 support this proposition related to the characterization of
18 diabetic testing supplies.

19 And so an attempt by the defendants to litigate the
20 truth of the allegations of the indictment at pretrial, that's
21 exactly what is happening here.

22 Now, in the defendants' reply they again argue that
23 the Government is trying to expand the scope of the alleged
24 crimes by stating that because the diabetic testing supply
25 claims by law cannot be submitted for reimbursement under

1 the Medicare Part B program is irrelevant. And again, their
2 issue pertains to the characterization. They're making --
3 they are trying -- defendant is trying to make a distinction
4 between diabetic testing supplies and diabetic supplies,
5 alcohol pads, which are used to test for diabetes, and that's
6 a supply that's used to test for diabetes versus diabetic
7 testing supplies. And these are all issues that should be --
8 that can be raised at trial and not an issue for this Court.

9 The defendant also relies on United States v. Buck,
10 that's B-u-c-k. In citing this case the defendants attempt
11 to argue that reference to diabetic testing supplies will
12 inflame the jury into believing that the defendants committed
13 more crimes than was actually charged in the indictment;
14 however, unlike Buck, there is no inflammatory language in
15 the indictment with regard to reference to diabetic testing
16 supplies.

17 "Diabetic testing supplies" is an innocuous term to
18 describe supplies that are used when testing insulin levels
19 for diabetes. There is no risk that the jury will convict
20 any of the defendants for committing crimes under the Part B
21 program, since that's not what's alleged. That's not what the
22 defendants are charged with. And as the defendants themselves
23 acknowledge, there is no reference to the prepping program in
24 the indictment.

25 In addition, the Government does not intend on

1 introducing evidence that the defendant did commit any crimes
2 under the Medicare Part B program, and mere reference to
3 diabetic testing supplies in the indictment will not
4 automatically inflame the jury into believing that they
5 have committed more crimes than what is actually alleged.

6 In Count 1, a reference to -- reference is made to
7 diabetic testing supplies to provide context and background
8 as it relates to how the conspiracy was executed.

9 And as to Counts 2 through 6 which incorporates
10 language from Count 1 by reference, Defendant Lazeki is
11 actually charged with submitting claims for diabetic testing
12 supplies. Reference to diabetic testing supplies is relevant
13 to the Government's case-in-chief and would be subject to
14 proof at trial.

15 And so for all those reasons, your Honor, the United
16 States would respectfully request that this Court deny the
17 defendants' motion.

18 THE COURT: Thank you, Ms. Dubal.

19 Mr. Donnini, before I ask for any rebuttal, I
20 neglected to ask any other of the attorneys for the defendants
21 if they wished to weigh in on this motion to strike
22 surplusage. So let me just run down that so I can make
23 that inquiry for the record.

24 Ms. Webster, on behalf of Mr. King, do you have
25 anything to add?

1 MS. WEBSTER: I don't. Thank you, your Honor.

2 THE COURT: Thank you.

3 And Mr. Burdick?

4 MR. BURDICK: No, sir.

5 THE COURT: And Mr. LaRene?

6 MR. LaRENE: Thank you. No.

7 THE COURT: Thank you.

8 And finally, Mr. Berman?

9 MR. BERMAN: No, your Honor. Thank you.

10 THE COURT: All right. Thank you.

11 Mr. Donnini, any rebuttal?

12 MR. DONINNI: Yeah. Briefly, your Honor.

13 So, again, Ms. Dubal said that essentially that's not
14 what's alleged, that reimbursement under Part B is not what's
15 alleged. And my problem with that is that diabetic testing
16 supplies are reimbursable under Part B, and there are five
17 instances in the indictment which say "false and fraudulent
18 claims for diabetic testing supplies." So if this case is not
19 about Part B, I'm not sure how I reconcile that, and that's
20 my -- that's my difficulty here.

21 I don't want to steal Mr. Berman's thunder here in
22 his motion for a bill of particulars, but the sentence that
23 I read earlier on page 1 of the Government's response where
24 it says, you know, "a massive multi-pronged healthcare fraud
25 scheme where" -- "involving dispensing expensive medications

1 such as Lidocaine and diabetic testing supplies resulting in
2 over \$80 million worth of false and fraudulent claims," again,
3 I'll only mention it because I know he is going to handle
4 this, but we don't know what claims.

5 So not only do we not know what Lidocaine claims, but
6 we don't know what portion of that might involve diabetic
7 testing supplies that are reimbursable under Part B. So I
8 think that that's a lead-in to the motion for a bill of
9 particulars, but we're left kind of scratching our heads with,
10 what claims are we defending? And if this isn't about claims
11 for diabetic testing supplies under Part B, my read of the
12 indictment is, that's what the indictment says. It doesn't
13 say that diabetic testing supplies are -- are for background
14 and for how they acquired patients, et cetera.

15 Thank you.

16 THE COURT: All right. The motion to strike
17 surplusage is one that is authorized under Rule 7(d) of
18 the Federal Rules of Criminal Procedure; however, I think
19 everybody acknowledges that these motions are rarely granted.
20 They are appropriately granted, however, when the language in
21 the indictment is information that is plainly irrelevant and
22 prejudicial -- a prejudicial assessment or an assessment of
23 prejudice, better stated, is pertinent and not impertinent to
24 the consideration of such a motion.

25 But that having been said leads to the rhetorical

1 question of how an item which might be a legal non sequitur
2 included in an indictment can be prejudicial.

3 It's not my practice to read the indictment to the
4 jury. I summarize it and don't permit anybody else to read it
5 to the jury. And certainly the indictment is not submitted to
6 the jury as evidence, because the indictment is not evidence
7 in the case.

8 The question, then, is whether or not the information
9 that's recited in the indictment is irrelevant and ought to be
10 excluded at trial, which really is an evidentiary question,
11 and it's one that's properly or more properly assessed in the
12 context of the proofs as they are presented.

13 This motion here does not present the rare exception
14 that the information alleged to be surplusage should be
15 stricken. And the Government, I think, credibly asserts that
16 the defendants' attempt to characterize some items they
17 supplied as diabetic testing supplies not covered by Medicare
18 Part D poses a factual issue that is subject to proof and
19 argument at trial.

20 The Government has explained in its response that it
21 intends to prove that the defendants' scheme included, as a
22 component, the conversion of patients from coverage under
23 Part B to Part D, which is relevant to help the jury
24 understand the background, means and ends of the criminal
25 conspiracy.

1 Regardless of the particular regulations under
2 which the specific dispensations might have been regulated,
3 information that's offered to complete the context or
4 background of a conspiracy is relevant, and consequently,
5 properly chargeable in an indictment even if it concerns
6 nominally unregulated or lawful acts which are offered to
7 explain the overall context of the conspiracy scheme itself.

8 The preamble of the indictment refers to Medicare
9 Part D in sections describing the overall background of the
10 criminal scheme, but the charging sections are unspecific and
11 the allegations of healthcare and wire fraud are not expressly
12 premised on the violation of any particular regulation, but
13 instead anchored by the more general allegation that the
14 defendant submitted numerous claims for medically unnecessary
15 items and services, alleging in an exemplary fashion that
16 those items include such things as prescription drugs,
17 diabetic testing supplies, which are neither needed nor
18 requested by the purported recipients.

19 So despite the defendants' position that the case is
20 only about Medicare Part D, the indictment itself betrays no
21 express limitation in that regard in the charges, in the
22 charging of the scheme to defraud.

23 So with respect, the motion to strike surplusage is
24 denied.

25 Going on, then, to the motion for bill of

1 particulars, Mr. Berman, I think Mr. Donnini did his best to
2 tee that one up for you, so you may proceed.

3 MR. BERMAN: Thank you, your Honor. And it is always
4 very helpful to follow Mr. Donnini.

5 The motion I filed for a bill of particulars has been
6 touched on by the argument the Court has heard so far today,
7 the importance of the motion for the bill of particulars.
8 It's been extensively briefed in my brief and the Government's
9 brief, and I don't mean to take up too much of the Court's
10 time by repeating arguments that it seems clear the Court is
11 familiar with.

12 But I would say just generally, we have asked for
13 the Court to order the Government to provide us with two types
14 of particulars. One, the identity of other conspirators,
15 co-conspirators; and also, particulars relating to the
16 specific false -- allegedly false claims for payment that
17 the Government alleges were submitted.

18 To take it in that order, the identities -- the
19 identity of co-conspirators is important for one -- for a very
20 specific reason, which is, the Government has provided us with
21 statements made by a large number of witnesses that were
22 interviewed during the Government's investigation, and it
23 seems likely that some of those witnesses would, in fact, be
24 called as defense witnesses.

25 The uncertainty of not knowing who the Government

1 considers to be a co-conspirator will pose a challenge to --
2 I suspect, based on experience -- persuading some of those
3 witnesses to appear as defense witnesses if they wanted to.
4 So with respect to that motion for a bill of particulars, it
5 is a very, very specific purpose why, in this case as opposed
6 to perhaps others, it is appropriate for the Court to order
7 the Government to provide us with the names of those
8 co-conspirators.

9 With respect to the request for a bill of particulars
10 identifying the specific claims for payment, though, as I have
11 said in my brief, the Government's indictment does provide
12 notice of the offense that the defendants are charged with,
13 I have no idea whatsoever which claims for payment the
14 Government considers both my client specifically to have
15 participated in in submitting to the Government and defendants
16 more generally.

17 I say -- and let me do them in the reverse order.
18 It's impossible to create -- to prepare a defense to an
19 allegation that false claims were submitted without knowing
20 what those false claims are. It's particularly hard for my
21 client because, as I touched on in my brief, my client isn't
22 even alleged in all the paragraphs of the indictment of having
23 been involved in submitting false claims.

24 So just for example, and I won't go through the
25 entire argument, but paragraph 34 of the indictment alleges

1 that three of the defendants submitted false claims for test
2 claims without the Medicare beneficiary's consent. My client
3 is not included in that allegation.

4 Paragraph 33 alleges that false and fraudulent test
5 claims were submitted without the physician's consent. My
6 client is not included in that allegation.

7 I have no way of knowing which claims I'm going to
8 have to attack or challenge or grapple with at trial based on
9 the Government's indictment. And unless the Government is
10 alleging that every single claim ever submitted by the company
11 was fraudulent, which I don't understand the Government's
12 allegations to be, and that's not what they have argued in
13 their response, then it is only fair that the defendants be
14 put on notice as to which claims they have to defend against.

15 This is not a case and it's not the sort of crime
16 where there is a reasonable number of transactions that
17 defendants' review in discovery could just perhaps discern on
18 their own which ones were unlawful. This is a case involving
19 tens of thousands -- my estimate, I don't know the exact
20 number -- of claims, and not only are there claims, but as the
21 Court has heard, those claims for payment are -- given the
22 Government's theory of the case, are related to telephone
23 calls that were made to specific patients in attempts to
24 obtain consent which the Government alleges wasn't obtained.

25 So unless these -- the specific claims that the

1 Government asserts were false are identified, I personally and
2 the defendants in general have -- are put in a position where
3 they have to listen to all of those recordings in an attempt
4 to try to guess which ones the Government is insisting was
5 unlawful.

6 So I have, to some extent, repeated what I have
7 already written in our briefs, but for those reasons and the
8 ones I have stated in writing, we would submit that it's
9 appropriate in this particular case for the Court to order
10 the Government to provide the defendants with the clarity
11 they need to prepare a defense to the allegations in the
12 indictment.

13 THE COURT: All right. Thank you, Mr. Berman.

14 Does anyone else wish to be heard on that from the
15 defense side? Raise your hand if you do.

16 Mr. Donnini.

17 MR. DONINNI: Your Honor, thank you.

18 I don't mean to be a broken record, but just going
19 back to what I said on the last argument, I agree with
20 Mr. Berman that I don't believe -- and we're going to hear
21 from them shortly -- that the Government is claiming that
22 every single claim is false and fraudulent; however, I did
23 point out that they spoke about Lidocaine and diabetic testing
24 supply claims that totaled \$80 million of false and fraudulent
25 claims.

1 So we are left in this position of scratching our
2 head wondering, is it all Lidocaine claims? Is it Lidocaine
3 claims and DTS claims? Is it \$80 million? Is \$80 million the
4 universe of claims over the five-year period?

5 And what Mr. Berman points out, there are recordings
6 after recordings after recordings, and to not be able to hone
7 in on the specific claims that the Government alleges to be
8 fraudulent, we're put to a herculean effort of trying to guess
9 what those may be.

10 THE COURT: Thank you. Anyone else?

11 I see no one else asking to be heard.

12 Mr. McCormack, I take it it's your response on this
13 one?

14 MR. McCORMACK: Yes. Thank you, your Honor.

15 Your Honor, I just want to respond to some of the
16 points that were recently raised in the reply and that were
17 raised today in court, and I'll rest on my pleadings for the
18 vast majority of the Government's position, your Honor.

19 THE COURT: You mean your briefs?

20 MR. McCORMACK: Yes. In the Government's briefs,
21 your Honor.

22 Essentially, the Government's indictment is not
23 vague. As the Court had already articulated today with
24 respect to issuing its ruling on the motion to dismiss, the
25 indictments track the statutory language and provides details,

1 factual details of the fraudulent schemes alleged, and the
2 manner and means in terms of how these co-defendants committed
3 this conspiracy, your Honor.

4 The issue of referring to unnamed co-conspirators
5 as well as not identifying the specific false claims of the
6 indictment does not mean that the indictment is vague.
7 Defense has not produced a case from the Sixth Circuit where
8 a defendant charged with a conspiracy to commit healthcare
9 fraud was granted a bill of particulars with respect to their
10 requests to identify false claims or unnamed co-conspirators,
11 as they do here, your Honor.

12 In their reply, they attempt to distinguish this case
13 from Elhorr by arguing that the substantive counts in Elhorr
14 provide information like the beneficiary's name, information
15 regarding the transactions. That's exactly what this
16 indictment includes, your Honor, with respect to Counts 4, 5,
17 and 6. The -- I'm sorry -- 2, 3, 4, 5, and 6, the substantive
18 counts, your Honor.

19 This case is no different than Elhorr. In Elhorr
20 the only issue was Count 1 with respect to the bill of
21 particulars, the conspiracy to commit healthcare fraud.
22 There were multiple defendants seeking to identify false
23 claims and the identity of unnamed co-conspirators, and there
24 the Court denied that request noting that those are not proper
25 subjects for a bill of particulars. And that's exactly --

1 THE COURT: Under the claims identified in Counts 2
2 through 6 of the indictment, do you intend to prove that any
3 other claims submitted were false?

4 MR. McCORMACK: Yes, your Honor.

5 THE COURT: Which ones?

6 MR. McCORMACK: Well, there's a number of claims,
7 your Honor.

8 THE COURT: And which ones?

9 MR. McCORMACK: You know, I can't -- I can't identify
10 each false claim right now, your Honor. I can speak to the
11 universe of false claims.

12 THE COURT: Can you tell me how many?

13 MR. McCORMACK: I cannot tell you the exact number of
14 how many false claims were alleged to have been submitted that
15 were fraudulent and false, your Honor.

16 THE COURT: Can you give me an approximation?

17 MR. McCORMACK: I cannot. What I can -- what I can
18 tell you with respect to the discovery, your Honor, the
19 defense relies on McQuarrie for a circumstance where an
20 overproduction of discovery would necessitate a bill of
21 particulars, and that is not the circumstance that we're in
22 here, your Honor.

23 THE COURT: Yes, but I would like you to stick with
24 my question for a minute.

25 You are intending to offer evidence at trial, I

1 presume, that a number of claims of undetermined amount are
2 false. How do you intend to prove that, by just showing the
3 paperwork for each of the claims?

4 MR. McCORMACK: We would put in testimony, your
5 Honor. For example, one of the allegations is that the claims
6 were submitted with respect to a doctor's MPI number who was
7 used to submit test claims. Within the discovery production,
8 the first discovery production, there is a folder labeled
9 "Medicare Data."

10 Within that folder there is a subfolder labeled
11 "Medic Data" and that -- through interview reports, that
12 doctor is identified as Dr. Peter Garretts.

13 Within that subfolder there is a file called
14 "Garretts Part D." That Excel spreadsheet demonstrates all
15 the false claims that were submitted by the co-defendants in
16 this case with respect to that allegation.

17 Additionally, your Honor, with respect to the
18 allegation that Attorney Berman is not aware of any false
19 claims regarding Ms. Peterson, at the bottom of -- I'm
20 sorry -- at paragraph 35 of the indictment, it alleges that
21 the Ms. Peterson conspired with her co-defendants to submit
22 claims for medically unnecessary prescription refills,
23 including dead beneficiaries.

24 Within the discovery production, your Honor, the
25 first discovery production, in that same folder, the "Medicare

1 Data" folder, there is a subfolder "Medic Data."

2 Within that folder there is another folder labeled
3 "Bene Sharing."

4 And in that there is a file called "After Death PDE
5 Records." And that Excel spreadsheet is a list of claims that
6 were submitted for beneficiaries after their death.

7 THE COURT: Mr. McCormack, is the discovery that
8 you're referencing indexed in any way?

9 MR. McCORMACK: Well, yes, your Honor. Every
10 production comes with a letter indicating what the discovery
11 is in terms of its Bates number and its source. And then
12 within the production itself, your Honor, the data and
13 actually all the discovery is within subfolders identified by
14 the type of discovery or the source of discovery.

15 And then within those subfolders you can whittle it
16 down to exactly what you're looking for; for example, an Excel
17 spreadsheet of all the false claims relating to dead
18 beneficiaries or all the false claims relating to Dr. Peter
19 Garretts' Part D submission. They are all labeled.

20 The Government has --

21 THE COURT: So if you were going to, say, prepare for
22 trial yourself, you would be able to identify the source or at
23 least the location of the information for the false claims
24 that you would intend to offer as evidence in trial by Bates
25 number, I guess?

1 MR. McCORMACK: Yes.

2 THE COURT: Or folder?

3 MR. McCORMACK: Yes, your Honor, within the folders.
4 Like, for example, an allegation that medically unnecessary --
5 I'm sorry -- that prescriptions were transferred from
6 Defendant Letko's pharmacies to his brother's pharmacies
7 without patient consent, there is a shared beneficiary
8 analysis within the data production which demonstrates shared
9 beneficiaries between both companies which helps identify
10 which universe of patients had their prescriptions transferred
11 from one entity to the other.

12 So with respect to that, your Honor, and those types
13 of Excel spreadsheets, they can be filtered, your Honor, by
14 information such as the date of services, the name of the
15 pharmacy, et cetera. So these -- you know, these are active
16 Excel spreadsheets that can be filtered and pivot tables can
17 be created to help maximize the utility of that data.

18 THE COURT: And this has been turned over already?

19 MR. McCORMACK: Yes, your Honor. The vast majority
20 of the data was produced within the first production, I
21 believe in October of 2019.

22 There's approximately 28 Excel spreadsheets that were
23 produced with respect to data. There's -- additionally,
24 there's PDF copies of analysis that was conducted by Medicare
25 contractors such as Quarland (phonetic) which identify the

1 number of -- the total universe of payments that each
2 particular pharmacy received with respect to Medicare Part D.
3 So it's possible to look at those PDF files and then figure
4 out the total universe of payments to those entities.

5 And lastly, your Honor, this notion that with respect
6 to a bill of particulars that the defendants are not evident
7 of the -- aware of the allegations against them, in addition
8 to the proper settings which are cited in our pleadings, I
9 believe, your Honor, it's evident from these pleadings as
10 well as the arguments you heard today that the defendants
11 appreciate and understand the allegations against them with
12 respect to Medicare and the -- at least in general, the false
13 claims.

14 So, your Honor, for all those reasons the Government
15 would ask that you deny the defendants' request for a bill of
16 particulars.

17 THE COURT: Does the Government intend to call as
18 witnesses at trial any individuals whom you would characterize
19 as an unindicted co-conspirator?

20 MR. McCORMACK: You know, your Honor, that's a good
21 question. I think there's a number of people that -- you
22 know, this was a large corporation and, you know, at this --
23 at this juncture, I'm not sure I could effectively answer that
24 question. So I --

25 THE COURT: Well, let me ask it a slightly different

1 way.

2 Do you -- are you aware of any unindicted
3 co-conspirators that you would not be intending to call as
4 witnesses at trial?

5 MR. McCORMACK: You know, your Honor, there was a lot
6 of people involved in the submission of these claims. You
7 know, a lot of people blessed some of the practices that were
8 going on. But at this point right now I am not aware of
9 calling any unindicted co-conspirators at this time, your
10 Honor.

11 THE COURT: All right. Mr. McCormack, any further
12 argument?

13 MR. McCORMACK: No, thank you, your Honor.

14 THE COURT: Thank you.

15 Mr. Berman, any follow-up?

16 MR. BERMAN: No, your Honor. Thank you.

17 THE COURT: All right. The bill of particulars
18 motions are authorized, that is, a bill of particulars is
19 authorized under Rule 7(f) of the Federal Rules of Criminal
20 Procedure, and it is meant to be used as a tool to minimize
21 surprise and assist the defendants in obtaining information
22 needed to prepare a defense and also to preclude a second
23 prosecution for the same crimes.

24 I don't think the double jeopardy concern is foremost
25 in the defendants' motion and the joinders, but rather, trial

1 preparation, I think, is really the main reason why the
2 defense has brought this motion.

3 The cases also tend to look to discovery as an
4 alternative method of providing information to the defendants
5 for trial preparation, and Mr. McCormack has identified a
6 means of determining what false claims the Government intends
7 to offer at trial and so that the defendant can -- defendants
8 can be prepared to address those as they come up.

9 Mr. McCormack tells me right now, and certainly
10 credibly, that he is not able to identify with particularity
11 specific claims that he intends to offer at trial that
12 allegedly were false when submitted, but he has identified
13 the method of locating those materials within the discovery.

14 And so I'm going to direct the Government to identify
15 the folders and subfolders that have been discussed here on
16 the record or any other ones that fall within those categories
17 to the defendants at this time, that is, to identify them to
18 the defendants so that they know where to look within the
19 discovery materials for the evidence that would constitute
20 false claims or at least the universe of false claims from
21 which the Government might select evidence to offer at trial.

22 And I will deny the motion for a bill of particulars
23 without prejudice and permit the defendants to renew that
24 motion after they have taken a look at the information
25 furnished by the Government so that they can look at the

1 discovery materials, and if there is additional confusion or
2 some vagaries with respect to what the evidence might be and
3 what claims they must defend against, we can approach it at
4 that time.

5 So the motion is denied without prejudice. The
6 Government is directed to produce the materials I have
7 identified, and I guess it's really locator materials,
8 because the materials themselves have been produced already.

9 And I'll set a deadline of the 24th, that's two
10 weeks, for the Government to furnish that to the defendants.

11 The motion otherwise is denied.

12 Finally, we have Defendant King's motion to sever.
13 That's Docket Number 90.

14 Ms. Webster, I think that's your motion; is that
15 correct?

16 MS. WEBSTER: It is, your Honor. Thank you.

17 THE COURT: All right. You may proceed.

18 MS. WEBSTER: Thank you, your Honor. I know that the
19 Court has --

20 THE COURT: Before you do, could I ask you to just
21 stand by for one second?

22 MS. WEBSTER: Sure.

23 THE COURT: All right.

24 (Pause in the proceedings at 3:47 p.m.)

25 THE COURT: Thank you. I wanted to -- I wanted to

1 print the Government's response to the motion, because I find
2 it easier to navigate this one with a paper copy rather than
3 the online copies.

4 But in any event, go ahead, Ms. Webster.

5 MS. WEBSTER: Thank you, your Honor.

6 Your Honor, I know the Court has read the motion,
7 so I just have a few you points that I want to highlight.

8 The Government essentially is conceding that there is
9 a Bruton issue in this case, which is based on Mr. Lazeki's
10 not one statement, not two statements, but four statements
11 that have been submitted or given to law enforcement.

12 And so, your Honor, we are hanging our hat on United
13 States versus Flowers. The Government does not distinguish
14 that case in its response. And I think that case is the more
15 appropriate case to follow on these facts.

16 I would also note, your Honor, that the Government
17 is stating that if we open the door with respect to, I guess,
18 Mr. Lazeki's statements that it would be willing to redact
19 names and use neutral terms or just outright remove my
20 client's name. And I think that's very problematic when
21 you look at the big picture.

22 So imagining jurors looking at documents that are
23 redacted in multiple places, I think that naturally, naturally
24 would lead to the jury trying to figure out who it is that is
25 being referred to. And I don't think that that is a realistic

1 option and that Mr. King should be severed, your Honor.

2 I also, your Honor, would state that this case, as
3 you have heard, has a lot of discovery. In a five-defendant
4 case it's not clear who the Government thinks played bigger
5 roles or smaller roles in terms of how they lay out their
6 indictment. And so I think that that presents this case as
7 one that's fraught with opportunity to prejudice Mr. King.

8 We have antagonistic defenses, as you can see here,
9 as we have said with respect to Mr. Lazeki, at least, pointing
10 the finger at my client, and I think that that is going to
11 be problematic.

12 And I know it's difficult to win on an antagonistic
13 issue. I know those aren't granted very often, your Honor,
14 but I think if ever there was a case, that this is a case that
15 presents itself to sever Mr. King.

16 And so, your Honor, for those reasons, I am asking
17 the Court to sever us from this case.

18 THE COURT: Thank you, Ms. Webster.

19 Does anyone else wish to -- anyone else on the
20 defense side wish to address this motion? Let me just go
21 through the list.

22 Mr. Donnini?

23 Mr. Donnini is shaking his head. I take that as a
24 "no."

25 MR. DONNINI: No. Thank you, your Honor.

1 THE COURT: Mr. Burdick?

2 MR. BURDICK: No, sir.

3 THE COURT: Thank you.

4 And Mr. LaRene?

5 MR. LaRENE: No. Thank you, sir.

6 THE COURT: Mr. Berman.

7 MR. BERMAN: No, your Honor.

8 THE COURT: Thank you.

9 MR. BURDICK: I think Mr. Eppel had raised his hand,
10 your Honor.

11 THE COURT: I'm sorry?

12 MR. EPPEL: Your Honor, I apologize. This is
13 Mr. Eppel on behalf of Mr. Letko.

14 THE COURT: Yes. I asked Mr. Donnini and we only
15 have one at a time.

16 Do you want to address this, though, really?

17 MR. EPPEL: There were a couple small points I wanted
18 to make, your Honor.

19 THE COURT: Well, okay. Go ahead. Make your points.

20 MR. EPPEL: The proposed redactions that the
21 Government has laid out, I think, are problematic in three
22 particular instances. And I'm happy to go through those, if
23 you like, your Honor.

24 The first one is on page 12, and it's the second
25 bullet point regarding patient transfers.

1 THE COURT: Page 12 of what?

2 MR. EPPEL: I'm sorry. This is of the Government's
3 response. So this is the Government's response which lays out
4 the proposed redactions to the statements.

5 THE COURT: So this is page 12 of the brief itself?

6 MR. EPPEL: Correct.

7 THE COURT: Okay. I've got it.

8 MR. EPPEL: And so the second bullet point down
9 regarding patient transfers, they propose redacting it to say
10 that "Lazeki brought up his concerns to others and Lazeki was
11 instructed to continue to fill prescriptions."

12 I think the problem there is, your Honor, the only
13 people that could have instructed Mr. Lazeki would be Mr. King
14 or Mr. Letko. So I don't know that that proposed redaction
15 cures the issue.

16 The second one, your Honor, that I'll point to is on
17 the next page, page 13, and it's the first bullet point, where
18 they propose redacting it to say that "Lazeki denied that AAMP
19 submits a claim in order to hold the patient until the refill
20 prescription is ready to be dispensed, although it may have
21 been happening at one of the other pharmacies."

22 That proposed redaction is actually worse for us,
23 your Honor, because the original statement is that it was
24 "happening at one of the other pharmacies owned by the Letko
25 brothers." That's not who is on trial here.

1 And if it's changed to just say "at one of the other
2 pharmacies," the jury may conclude that they are talking about
3 other A1C Pharmacies which are at issue in this trial, and
4 which are, you know, pharmacies that Jim Letko himself had
5 interest in as opposed to pharmacies that were owned by his
6 brothers, which are not at issue in this trial.

7 And the same issue occurs in -- further down on
8 page 13. It is the -- I guess, the third main bullet point
9 regarding post-interview information. They propose changing
10 it from "They just rotated the patients to one of the other
11 Letko brothers' owned pharmacies" to "They just rotated the
12 patients to one of the other pharmacies."

13 Again, the implication there may be the jury could
14 think we're talking about other A1C Pharmacies that Mr. Jim
15 Letko had an interest in as opposed to pharmacies his brother
16 might have had an interest in. That to me seems worse for
17 Mr. Letko if it's brought in that way.

18 And so I just wanted to bring the Court's attention
19 to those three particular redactions that are proposed by the
20 Government.

21 THE COURT: Thank you, Mr. Eppel.

22 I don't see anyone else that wishes to be heard.

23 And so is this yours, Ms. Dubal or Mr. McCormack?

24 MS. DUBAL: It's mine, your Honor.

25 THE COURT: All right. Thank you. Go ahead, if you

1 wish.

2 MS. DUBAL: Thank you so much.

3 So, your Honor, I'll keep my argument brief and
4 really just focus on the defendant's reply. The first point
5 being that the defendant has stated that the Government does
6 not address Flowers. From the Government's vantage point,
7 they focus on four statements, and Mr. Eppel has added one
8 additional statement that isn't covered by the reply which I
9 can address that.

10 In terms of the first statement that is referenced,
11 and that's in Exhibit A at 4, and that is -- excuse me. Just
12 one moment, your Honor.

13 That is the statement with regard to -- I just need
14 one moment, your Honor.

15 That is the statement that -- in the defendant's
16 reply brief that states that Lazeki brought up his concerns
17 to Jim and -- Jim and King.

18 Your Honor, the Government's position is that this
19 comports with the case law that is cited in the Government's
20 brief and is more in line with Vasilakos than it is with
21 Flowers. I'm not sure if I'm pronouncing that correctly, but
22 I will spell it. It's V-a-s-i-l-a-k-o-s.

23 The Government's position is that Flowers is
24 distinguishable because in that case the Sixth Circuit
25 analyzed the issue after trial. And the Sixth Circuit was

1 really focused on the fact that evidence was presented
2 immediately prior to the admission of defendant's statements,
3 effectively -- of the defendant's statement, effectively
4 negated the cured Brutonized statement.

5 Since we're in a pretrial stage right now that issue
6 doesn't exist here and the Government does not intend on
7 making that same mistake in its case-in-chief.

8 Now, your Honor, with that being said, if the Court
9 is inclined to grant this motion based at all on this
10 statement alone, the U.S. proposes to redact the entirety
11 of the statement from Mr. Lazeki's -- from that --

12 THE COURT: When you say "redact the entirety of the
13 statement," that means not offer it in evidence; right?

14 MS. DUBAL: That's right, your Honor. That's right.

15 THE COURT: Do you intend to offer any of these
16 statements in your case-in-chief?

17 MS. DUBAL: Your Honor, you know, I think that --
18 yes, we do intend on offering the statement, Mr. Lazeki's
19 statement in our case-in-chief. I think the -- I think at a
20 trial phase, depending on how the evidence is presented, you
21 know, I think that I have been in circumstances where we will
22 present a defendant's statement and parts of it are redacted
23 after speaking with defense counsel, depending on how the
24 evidence has played out, and that's obviously something that
25 the Government is willing to do. But at -- but yes, we do

1 anticipate, at this stage, introducing some of these
2 statements into evidence.

3 And when you say -- and just to clarify, your Honor,
4 and I should have done this before, the United States intends
5 on introducing Mr. Lazeki's statement subject to the
6 redactions that are proposed here in this -- in our response.

7 The next statement that -- in the defendant's reply
8 brief that is addressed at Exhibit A at 3 that involves Letko
9 instructing Lazeki to dispense supplies as a part of the
10 Lidocaine campaign.

11 Your Honor, the Government has properly cured that
12 statement by removing any mention or obvious implication of
13 the defendants. Since the Government has properly cured the
14 statement, the defendants are now taking issue with the term,
15 "Lidocaine campaign" and stating that it implicitly refers to
16 others because of the way a campaign is inherently run.

17 The term "Lidocaine" does not implicate Bruton
18 because this term does not facially incriminate the other
19 defendants, and therefore, does not violate the confrontation
20 clause. This is simply defendant's attempt to sort of strip
21 the co -- Mr. Lazeki's statement by creating and calling this
22 a Bruton issue.

23 Now, as far as Exhibit A at 4, and this is what
24 Mr. Eppel referenced with regard to modifying the language
25 of the two statements that refer to the Letko brothers'

1 pharmacies, the Government's position is that Flowers is not
2 implicated with regard to the Government's proposed edits to
3 this statement. These statements arguably don't implicate
4 Bruton, since had the report been written such that each
5 individual pharmacy was named or if the pharmacies were
6 referred to as the A1C Pharmacies or the Global Pharmacies --
7 and for your Honor's reference, the Global Pharmacies are
8 Mr. Letko's brother, John Letko's, that's the name of his
9 organization, the Global Pharmacies -- this would not be a
10 valid Bruton claim.

11 And under the defendant's argument there is no
12 reference to -- if we were to adopt the defendant's argument
13 as to this statement, there is no reference to any of the
14 specific A1C Pharmacies that would be admissible through the
15 Lazeki statements, not even All American Medical Pharmacy,
16 which is AAMP, which is the pharmacy that Lazeki worked at.

17 This is a conspiracy to commit healthcare fraud, as
18 your Honor is well aware, and it is specifically alleged in
19 the indictment that patient transfers were taking place
20 amongst the A1C and Global Pharmacies whenever the A1C
21 Pharmacies lost the PBM contract, and mere references to
22 those pharmacies in a defendant's statement does not
23 necessarily trigger Bruton.

24 However, with that being said, in an abundance of
25 caution, the Government did propose to cure these statements

1 to remove any mention or obvious implication of Mr. Letko.
2 Referring to the A1C Pharmacies as "other pharmacies" instead
3 of "the Letko pharmacies" does exactly what Bruton is
4 concerned with, which is that the jury would place all the
5 blame on Letko by virtue of Mr. Lazeki's statement referencing
6 the A1C Pharmacies and Letko-owned or Letko brothers'
7 pharmacies.

8 The Government's position is that the redaction
9 properly cures any potential Bruton issue for the defendants.

10 And again, your Honor, if your Honor is inclined to
11 grant this motion based on these two statements, the United
12 States would propose to redact the entirety of the statement
13 in question to remove any reference at all to even Mr. Letko
14 and Mr. King.

15 THE COURT: All right. You do concede, Ms. Dubal,
16 that these -- none of these statements are admissible against
17 any of the defendants except Mr. Lazeki; correct?

18 MS. DUBAL: Yes, your Honor.

19 THE COURT: All right. Thank you. Any further
20 argument?

21 MS. DUBAL: I do not. Thank you, your Honor.

22 THE COURT: Thank you.

23 Ms. Webster, anything else?

24 MS. WEBSTER: No, your Honor. I don't have anything
25 further.

1 THE COURT: All right. The joinder rule is Rule 8
2 and it permits the Government to join offenses of a similar
3 character or based on the same act or transaction and join
4 defendants on the same basis.

5 Rule 14 authorizes severance. Severance is
6 authorized if it appears that consolidation will prejudice the
7 defendant. Prejudice arises when there is serious risk that a
8 joint trial would compromise specific trial rights of one of
9 the defendants or prevent the jury from making a reliable
10 judgment about guilt or innocence.

11 The defendant presents two bases for severance. One
12 is the Bruton problem. The other is the antagonistic defense
13 problem. The second one is much easier to deal with, in my
14 view.

15 Antagonistic defenses only pose a problem when one
16 person's claim of innocence is predicated solely on the guilt
17 of a co-defendant. There is no such claim here, and the
18 defendant merely argues that they may attempt to foist -- that
19 there is no suggestion that they may attempt to foist blame
20 on co-defendants or argue that they were less culpable.

21 The Sixth Circuit, in United States versus Warner,
22 indicates that the antagonistic defenses must present some
23 sort of conflict that is irreconcilable. I don't find that
24 there is a basis for severance just because of antagonistic
25 defenses, and that ground for the motion does not persuade.

1 The Bruton problem is more substantial here. I
2 have taken a look at the statements. The statement would
3 be admissible against Mr. Lazeki at trial under Rule 105.
4 Rule 105 -- that's Evidence Rule 105, says that evidence
5 admissible against one person can come in with a limiting
6 instruction, but if a limiting instruction is ineffective,
7 then the rule of balancing unfair prejudice and probative
8 value engages, Rule 403.

9 The prejudicial effect of such a statement is tied
10 directly to the Sixth Amendment confrontation right, and
11 hence, we have a Bruton problem.

12 Redacting the statements sometimes solves the
13 problem, but just taking a look at the Government's responses
14 and looking at the proposed redactions, I'm not particularly
15 persuaded that they would be effective in curing the prejudice
16 enuring to the other defendants in the case.

17 Redaction and sanitizing statements like this is
18 always a messy business. The decisions usually are best made
19 contextually. But my solution here, if I deny severance,
20 which the Government urges me to do, is to simply exclude the
21 statements that I find to be harmful.

22 I'm not going to give an advanced ruling on which of
23 these statements can come in and can't right now because, as
24 I said, context is important.

25 But I will deny the motion to sever Mr. King's case

1 from the rest of the defendants for a joint trial, warning
2 the Government, however, that the evidence that they may want
3 to offer in the form of Mr. Lazeki's statements may not be
4 received at the appropriate time.

5 With that said, however, the motion is denied.

6 Now, I don't believe I have any other motions on the
7 docket that are --

8 MR. LaRENE: Judge, the adjournment motion. The
9 motion to adjourn the trial date was noticed for today, Judge.

10 THE COURT: Mr. LaRene, I don't think I recognize
11 adjournment motions. That's my policy.

12 MR. LaRENE: You don't recognize -- you can't see
13 them?

14 THE COURT: I'm sorry. I can't hear you. Did you
15 say "adjournment"?

16 MR. LaRENE: Yes. I said joint motion. Joint
17 motion.

18 THE COURT: Oh, all right.

19 MR. LaRENE: Perhaps that will make it easier to
20 find.

21 THE COURT: Yeah. No, in all seriousness, this is a
22 motion that basically circumstances will take care of. We
23 have a trial date on November -- what is it?

24 MR. LaRENE: November 3, Judge.

25 THE COURT: Yeah. The likelihood of this trial

1 proceeding ahead on November 3 in this courthouse is nil.

2 MR. LaRENE: Understood.

3 THE COURT: I can set a trial date. I think you
4 wanted something in April. Isn't that what you asked for?

5 MR. LaRENE: We all sort of got together and in a
6 series of e-mail communications came up with a date of
7 April 12 or thereafter that basically accommodated all
8 counsels' schedules. And I don't remember what -- I don't
9 remember the details at this time.

10 THE COURT: You say "all," meaning including the
11 Government?

12 MR. LaRENE: Including the Government, Judge.

13 THE COURT: And so you were of one mind?

14 MR. LaRENE: It's hard to believe, I know, but I
15 believe it is true in this case.

16 THE COURT: Okay. And so you made phone calls, you
17 say?

18 MR. LaRENE: We -- I think it was mostly e-mails.

19 THE COURT: All right. Well, still, that's the overt
20 act.

21 MR. LaRENE: That's the overt act. That's right.
22 That's right.

23 THE COURT: You know, I think I'm pretty comfortable,
24 subject to my -- subject to a strenuous objection from my case
25 manager, granting that motion and setting that date, just

1 for planning purposes, and excluding the time based upon the
2 CARES Act and other exigencies that fall within the umbrella
3 of the coronavirus problem. Hopefully by then we will have
4 juries back in the building.

5 In fact, I spent all morning with a group going
6 through to try to identify courtrooms that we could use so
7 we could get jury trials started again, and the prospect of
8 trying multi-defendant cases in this courthouse and trying
9 to keep social distancing within the facilities that we have
10 are quite daunting.

11 And I guess that I would include all of those
12 observations in my finding to exclude the time between now and
13 your new date. But I'll grant that motion.

14 MR. LaRENE: Thank you, sir.

15 THE COURT: And for planning purposes, I will enter
16 an order.

17 Probably what I will do in the order is set a status
18 conference in about 30 to 45 days that we can conduct not
19 necessarily on the record and not with the necessity of
20 defendants being present but with counsel present, so we can
21 talk about some of the discovery problems and issues that have
22 cropped up today and production and how things are going.

23 I don't believe that there are any other pretrial
24 motions except Ms. Peterson's severance and venue motion,
25 which is Docket Number 63, that I have under advisement right

1 now. But there is nothing else that I think I have to decide.

2 Do you agree, Ms. Dubal?

3 MR. LaRENE: I think that's correct, Judge.

4 THE COURT: Mr. LaRene agrees.

5 Does the Government agree?

6 MS. DUBAL: Yes, your Honor. Thank you.

7 THE COURT: All right. All right. Okay. Now, is
8 there anything else that we need to discuss this afternoon?

9 From the Government first?

10 MS. DUBAL: Not from the Government, your Honor.
11 Thank you.

12 THE COURT: Thank you.

13 Mr. Donnini?

14 MR. DONINNI: No, your Honor. Thank you.

15 THE COURT: Mr. Eppel?

16 MR. EPEL: Sorry. No, your Honor.

17 THE COURT: And Ms. Webster?

18 MS. WEBSTER: Nothing further. Thank you.

19 THE COURT: Mr. Burdick?

20 MR. BURDICK: No, sir. Nothing. Thank you.

21 THE COURT: All right. And Mr. LaRene, you said no.

22 MR. LaRENE: No, sir.

23 THE COURT: And Mr. Berman?

24 MR. BERMAN: No, your Honor. Thank you.

25 THE COURT: All right. Thank you all. I appreciate

1 you participating in this fashion. I hope you all stay well
2 and safe.

3 Court is adjourned.

4 (Proceedings adjourned at 4:11 p.m.)

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9 **CERTIFICATE OF COURT REPORTER**

10
11
12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above-entitled matter.

14
15 s/ Rene L. Twedt
16 RENE L. TWEDT, CSR-2907, RDR, CRR, CRC
 Federal Official Court Reporter

October 14, 2020
Date